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THE RIGHT OF A BONA FIDE OCCUPANT TO COMPENSATION FOR IMPROVEMENTS PLACED UPON THE LAND OF ANOTHER.—Under the rigid rule of the common law, whoever puts improvements on the land of another does so at his peril, whether he acts in good faith or in bad faith, whether he acts under a mistake of law or of fact, whether he has actual or constructive notice of an adverse claim; and whenever any other party judicially establishes his title to the land, such party is entitled to all the improvements made upon it by the adverse occupant.[1] But when for any reason the true owner must necessarily come into equity to establish his claim, the court will refuse to lend its aid unless the petitioner will first compensate the *bona fide* occupant for improvements put upon the premises by him, upon the principle that he who seeks equity must do equity.[2] According to the weight of authority, however, the *bona fide* occupant cannot himself move in a court of equity for such compensation.[3] This equitable rule allowing compensation for improvements has been imported into the common law courts, but only to the extent of the value of the rents and profits owing by the adverse occupant to the true owner, and never in excess of that amount.[4] At present, under the laws known as "betterment acts," passed in many States, the *bona fide* possessor has the right to recover for improvements in a direct action.[5]

In order for a claimant to recover at common law or under these

[1] See Graham *v.* Connersville, etc., R. Co., 36 Ind. 463, 10 Am. Rep. 56.
[2] Davis *v.* Smith, 5 Ga. 274, 48 Am. Dec. 279.
[3] See Davis *v.* Smith, *supra.*
[4] Jackson *v.* Loomis, 4 Cowen (N. Y.) 168, 15 Am. Dec. 347.
[5] Va. Code, 1904, ch. 125.

statutes, it is settled that he must have been, at the time the improvements were made, (1) occupying the land adversely to the owner,[6] (2) occupying the land under color of title,[7] and (3) acting in good faith.[8] The first two requirements are easily ascertained, but the third, good faith, is difficult to determine. As to what constitutes bad faith as a matter of law, or rather what constitutes a conclusive presumption of bad faith on the part of the occupant, the courts are in dire conflict. The decisions on the subject may, however, be divided into two distinct classes. The first, taking a narrow and technical view, holds that constructive bad faith is sufficient to preclude a recovery; the second, taking a broad and liberal view, holds that to warrant a recovery there need only be good faith as distinguished from bad faith, or, in other words, there must be actual bad faith in order to preclude a recovery. The decisions of Virginia,[9] West Virginia and Kentucky serve as good examples of the technical view, while those of Texas, Arkansas and Georgia illustrate the liberal view.

Under the former, a party who, having notice of facts which render his title defective, nevertheless through a mistake of law regards it as good, cannot recover compensation for improvements; the court applying the legal maxim *ignorantia juris non excusat.*[10] And the same rule prevails, even though when the improvements were made the occupant was holding the land under a writ of possession.[11] The reasoning of the courts in these cases is simple, but severely technical. Ignorance of the law excuses no one, and when an adverse occupant is fully informed as to the facts, but makes a wrong application of the law thereto, he is held to be a willful trespasser and consequently not entitled to compensation for improvements. The liberal view, on the other hand, suggests perhaps the true principle and correct decision. According to it, a mistake of law resulting in a mistake of title or right to property is treated as a mixed mistake of law and fact and, as such, is excusable.[12] It is

[6] Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.
[7] Bryan *v.* Councilman, 106 Md. 380, 67 Atl. 279; Gann *v.* Spencer, 167 N. C. 429, 83 S. E. 620.
[8] Bryan *v.* Councilman, *supra.*
[9] In order to obtain compensation for permanent improvements put upon premises while in possession, the possessor must, at the time the improvements were made, have had no notice, either actual or constructive, of an adverse claim. Effinger *v.* Hall, 81 Va. 94. See also Graeme *v.* Cullen, 23 Gratt. (Va.) 266. Means of notice, with the duty of using those means, is equivalent to actual notice. Fulkerson *v.* Taylor, 102 Va. 314, 46 S. E. 309. But where the possessor bought the land at a judicial sale, he may presume that all the proceedings in the cause have been rightly conducted, and therefore be a holder in good faith, even though there is a defect in the chain of title. See Effinger *v.* Hall, *supra.*
[10] Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Chesapeake, etc., R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; Pittsburgh & W. Va. Gas Co. *v.* Pentress Gas Co. (W. Va.), 100 S. E. 296.
[11] Chesapeake, etc., R. Co. *v.* Deepwater R. Co., *supra.*
[12] Blakeman *v.* Blakeman, 39 Conn. 320.

true that one who knows the facts is presumed to know the law applicable thereto, but when a statement is made as a fact, which happens to involve, as most facts do, a conclusion of law, it is notwithstanding a statement of fact and not a statement of law. For example, suppose the occupant, having notice of all the facts which constitute his title, has come to the conclusion in good faith that he owns the land; it is a fact that he thinks he owns the land, and the circumstance that he has made a mistake of law in arriving at this conclusion should in no way alter the situation. The result is a mixed mistake of law and fact.[13] If a person, in the honest belief that he has the superior title, permanently improves the subject matter, he ought in good conscience to be entitled to recover the value of the improvements. If not, his property is taken from him without compensation, for the reason that he is not sufficiently learned in the law to be able, in a case involving intricate legal propositions, to foresee the final determination of such propositions by a court of last resort, not always infallible in its conclusions.

Again, the courts adhering to the technical view hold that mere notice of an adverse claim, however insignificant or unfounded it may appear, will preclude a recovery for improvements made after such notice has been received.[14] This notice may be either actual or constructive. Thus a person, who is charged with notice of matter of record rendering his title bad, is not entitled to compensation for improvements made thereafter.[15] The courts base their decision on the ground that means of obtaining knowledge, with the duty of using those means, is equivalent to actual knowledge and sufficient to constitute bad faith.[16] The liberal view, on the other hand, holds that one may be an occupant in good faith, though aware of an adverse claim, if he has reasonably strong grounds to believe such claim to be destitute of just or legal foundation.[17] Here the distinction is drawn between affirmative good faith and affirmative bad faith, and bad faith is not implied from any set of rules. Each case stands on its own footing. It is necessary that the reputed owner should have acted in good faith, that is to say, fairly, considerately, in good conscience, with integrity of purpose, and without rash haste. But it is not inconsistent with good faith

[13] See Eaglesfield *v.* Marquis of Londonderry, L. R. 4 Ch. Div. 693, 702. See also Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524.

[14] McKim *v.* Moody, 1 Rand. (Va.) 58. See also Effinger *v.* Hall, *supra.*

[15] Effinger *v.* Hall, *supra.*

[16] Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

[17] Shipp *v.* Cartwright (Tex.), 182 S. W. 70; Pritchard *v.* Williams (N. C.), 96 S. E. 733. Thus where a competent surveyor of good reputation makes a survey of the land, and through a mistake points out to the buyer land as included in his purchase, which in reality is not included, the purchaser making improvements thereon is entitled to compensation therefor. Fain *v.* Nelms (Tex.), 113 S. W. 1002. Also one is a *bona fide* holder, if he shows that he acted on a well grounded belief, produced by the advice of competent counsel, that he had acquired good title. See Griswold *v.* Bragg, 6 Fed. 342.

that some person has at some time asserted a claim to the property, since the occupant may still believe his title to be the better of the two.[18] So, under this view, constructive notice is equivalent to no notice, since good faith is a question of fact and not of law.[19]

According to the technical view, notice of the fact that the title is in actual litigation will preclude a recovery for improvements made after receipt of such notice.[20] And the same rule prevails, even though the lower court has held in favor of the occupant and the improvements were made before the holding was reversed on appeal.[21] While this precise point has never come squarely before the courts following the liberal view,[22] it is reasonable to believe that, where the improvements are made after the decision in the lower court, or even where, during the pendency of the *nisi prius* suit, the occupant can still honestly believe his title to be good, he may recover compensation therefor. Otherwise, pending the litigation, he cannot improve without risking the loss of the improvements; and he dare not let the property remain idle, for he may be held liable for rent and damages for neglecting to repair. He should not be required, in order to avoid loss, to surrender the property, when, sustained by the advice of counsel and by the decision of the lower court, he believes his title to be good, and honestly expects a favorable decision in the appellate court.

The only advantages of the technical view are its simplicity of application and certainty of result. Under the liberal view, however, where the question of good faith is generally submitted to the jury, justice is more often obtained.[23] If the jury finds, in spite of actual or constructive notice of an adverse claim, that the occupant acted in good faith, a recovery should be permitted. The statutes require good faith, which is a question of fact, and is not to be presumed conclusively from any set of rules. Otherwise, the very persons whom the "betterment acts" were designed to protect, namely, those putting permanent improvements on the lands of others in good faith, are subjected to a forfeiture. The true owner loses nothing. He is compelled to compensate the occupant only for the enhancement in value of his property. Where the equities are equal, the law will prevail; and the better doctrine of law is that *bona fide* occupants should be compensated for improvements.

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[18] Griswold *v.* Bragg, *supra*. The fact that diligence might have shown the defendant that he had no title does not necessarily negative good faith. Petit *v.* Flint ,etc., R. Co., 119 Mich. 492, 78 N. W. 554.

[19] McDonald *v.* Rankin, 92 Ark. 173, 122 S. W. 88.

[20] Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285; Upton's Committee *v.* Handley (Ky.), 123 S. W. 1188.

[21] Pittsburgh & W. Va. Gas Co. *v.* Pentress Gas Co., *supra*.

[22] See Faison *v.* Kelly, 149 N. C. 282, 62 S. E. 1086, where the fact that the lower court had held for the occupant was considered sufficient proof that he acted in good faith. Also in Whitney *v.* Richardson, 31 Vt. 300, and Griswold *v.* Bragg, *supra*, it was held that the occupant was a holder in good faith even after notice of a threatened suit by the adverse claimant.

[23] See Jones *v.* Merrill, *supra*.